Filed 1/22/19 Garcia v. Tropicale Foods, Inc. CA

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ANA GARCIA, Plaintiff and Respondent, v. TROPICALE FOODS, INC., Defendant and Appellant.	E069024 (Super.Ct.No. CIVDS1614480) OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster, Judge. Affirmed.

Wolflick & Simpson, Gregory D. Wolflick, David B. Simpson and Adam N. Bouayad for Defendant and Appellant.

Dumbeck & Dumbeck, Jason D. Dumbeck and Jon B. Dumbeck for Plaintiff and Respondent.

Defendant and respondent Tropicale Foods, Inc. (Tropicale) appeals the denial of its motion to compel arbitration against plaintiff and respondent Ana Garcia. The trial

court found that Tropicale failed to prove by a preponderance of the evidence that Garcia signed an arbitration agreement. We affirm.

I. FACTS

Garcia was a line production worker at Tropicale's factory in Ontario, California. Garcia alleges that she was fired by Tropicale in August 2015 soon after she complained to human resources about sexual favoritism and a hostile work environment. Garcia then filed suit for retaliation and other causes of action.

Tropicale moved to compel arbitration, attaching a Dispute Resolution Agreement (agreement) with Garcia's purported signature.[1] In a declaration in support of her opposition, Garcia represented that she did not recall ever seeing or signing the agreement and that she did not believe the signature to be hers. Because Garcia is a native Spanish speaker who does not understand English, her attorney translated the declaration into Spanish for her before she signed it. Tropicale then objected to Garcia's declaration on the grounds that her attorney's translation "interposes a layer of hearsay" (italics omitted) over it and that Jon B. Dumbeck, the attorney, laid no foundation for his statements that he is fluent in Spanish and that he accurately translated the declaration.

The trial court denied Tropicale's motion, stating that Tropicale's evidence was "insufficient to show by a preponderance of the evidence" that Garcia signed the agreement. The trial court also overruled the above objections to the declaration.

---

[1] The agreement is between Garcia and Select Staffing, a staffing agency that assigned Garcia to work at Tropicale in 2014. The agreement names Tropicale as a third party beneficiary.

II. ANALYSIS

A. *Applicable Law*

"The principles governing petitions to compel arbitration are well established. Public policy favors contractual arbitration as a means of resolving disputes." (*Espejo v. Southern California Permanente Medical Group* (2016) 246 Cal.App.4th 1047, 1057.) "But that policy '"'does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration.'"'" (*Ibid.*)

Code of Civil Procedure section 1281.2 provides that "[o]n petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists . . . ."

"[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) In deciding the petition, "the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final

determination." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.)

A defendant may meet its "*initial* burden to show an agreement to arbitrate by attaching a copy of the arbitration agreement purportedly bearing the opposing party's signature." (*Espejo v. Southern California Permanente Medical Group, supra,* 246 Cal.App.4th at p. 1060.) If the plaintiff challenges the validity of that signature in opposition, the defendant is "then required to establish by a preponderance of the evidence that the signature was authentic." (*Ibid.*) Failure to recall signing an arbitration agreement is sufficient to challenge the validity of the signature. (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 846 ["In the face of Ruiz's failure to recall signing the 2011 agreement, Moss Bros. had the burden of proving by a preponderance of the evidence that the electronic signature was authentic . . . ."].)

"'There is no uniform standard of review for evaluating an order denying a motion to compel arbitration.'" (*Carlson v. Home Team Pest Defense, Inc.* (2015) 239 Cal.App.4th 619, 630.) Generally, "'[i]f the court's order is based on a decision of fact, then we adopt a substantial evidence standard.'" (*Ibid.*) However, where, as here, "'the issue on appeal turns on a failure of proof . . . the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law.'" (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 466 (*Sonic*); see also *id.* at p. 465 [where trier of fact concludes that the party with the burden of proof fails to carry the burden, it is "misleading" to characterize the standard of review as one of substantial evidence].) "'Specifically, the question becomes

whether the appellant's evidence was (1) "uncontradicted and unimpeached," and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."'" (*Id.* at p. 466.) "[U]nless the trial court makes specific findings of fact in favor of the losing [party], we presume the trial court found [that party's] evidence lacks sufficient weight and credibility to carry the burden of proof." (*Bookout v. State of California ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1486.)

B. *Discussion*

1. *Evidence Compelling a Contrary Finding*

Tropicale met its initial burden by attaching the agreement, which purportedly bears Garcia's signature. (See *Espejo v. Southern California Permanente Medical Group, supra*, 246 Cal.App.4th at p. 1060.) Because Garcia testified that she does not recall signing the agreement, however, Tropicale then had "the burden of proving by a preponderance of the evidence that the . . . signature was authentic." (*Ruiz v. Moss Bros. Auto Group, Inc., supra*, 232 Cal.App.4th at p. 846.) The trial court found that Tropicale did not carry that burden, and Tropicale's evidence does not compel a contrary finding here.

Tropicale's evidence was not "'"of such a character and weight as to leave no room for a judicial determination"'" that Garcia did not sign the agreement. (*Sonic, supra*, 196 Cal.App.4th at p. 466.) Here, Tropicale offers two items to show that the trial court erred: a declaration from Marissa Jara, one of its Human Resources Coordinators,

and what it describes as a "simple comparison" of the signature on the agreement with Garcia's signature on her declaration. We consider each in turn.

a. *Jara's Declaration*

Jara contends that Garcia signed the agreement, but the trial court was not compelled to find that the declaration had sufficient weight to carry Tropicale's burden.

For one, Jara's testimony on the circumstances surrounding Garcia signing the agreement offers little more than a bare statement that she signed it. Jara stated that "[a]t some point before the end of Ms. Garcia's assignment in August 2015, it came to Tropicale's attention that she had not executed an Arbitration Agreement." "As such," Jara continued, "Ms. [Garcia] was presented with [an] Arbitration Agreement, which was executed and maintained in the ordinary course of business . . . ." Jara does not explain, for instance, how Tropicale became aware that Garcia had not signed an arbitration agreement, when Tropicale became aware (other than noting that it was sometime before she was terminated), who presented Garcia with the agreement, or when she purportedly signed it. Jara's lack of personal knowledge, and the timeline of events in particular, takes on greater significance here: the handwritten date on the agreement suggests that it was signed in September 2015, but Garcia denies signing anything for Tropicale then, as she was fired in August 2015.[2] Thus, by not providing any specific details as to the circumstances surrounding Garcia's purported signature, Jara merely offers a conclusory

[2] The marking indicating the month has a "7" and a "9" superimposed on top of each other, suggesting that the agreement was signed either in July or September 2015. Tropicale acknowledges that it does not know exactly when the agreement would have been signed.

assertion that Garcia signed the agreement without any facts that provide support for that assertion.

Additionally, Jara acknowledges that Tropicale did not follow its standard policy with regard to Garcia. Jara does not explain why Garcia did not sign an arbitration agreement prior to starting at Tropicale even though, as Jara states, "[i]t was Tropicale's policy and practice to have temporary staff sign an Arbitration Agreement prior to the commencement of their assignment." (Jara does state that there are times when, "for whatever reason," the policy is not followed, but offers no details as to why it was not followed in Garcia's case.) Jara's statement here therefore undercuts her assertion that Garcia's agreement was "executed . . . in the ordinary course of business . . . ."

Tropicale argues that Jara's declaration properly laid a foundation for admitting the agreement as a business record, citing section 1271 of the Evidence Code. That section, however, merely provides when a document will "not [be] made inadmissible by the hearsay rule." (Evid. Code, § 1271.) It does not compel a trial court to admit the document as evidence. (See *Ocean Shore R. R. Co. v. Doelger* (1960) 179 Cal.App.2d 222, 236 [evidence must still be relevant even if business record exception applies].) More importantly, even if the agreement were admitted, the signature on it need not be accepted as Garcia's. "Just because, as a preliminary matter, a court finds sufficient grounds to admit evidence does not mean it will ultimately have probative value or persuasive effect." (*Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines, Inc.* (2014) 231 Cal.App.4th 134, 187.) Accordingly, even if Jara laid proper foundation for

admitting the agreement as a business record, Tropicale's burden was not necessarily satisfied.

"We apply the usual rule on appeal that the trier of fact is not required to believe the testimony of any witness, even if uncontradicted." (*Bookout v. State of California ex rel. Dept. of Transportation*, *supra*, 186 Cal.App.4th at p. 1487.) Here, even assuming, as we do, that Jara's declaration was """uncontradicted and unimpeached""" (*Sonic*, *supra*, 196 Cal.App.4th at p. 466), the trial court was not compelled to find that Garcia signed the agreement due to Jara's declaration. It could find the declaration insufficiently persuasive to carry Tropicale's burden.

b. *Visual Comparison*

Tropicale also contends that a "simple comparison" between the signature on the agreement and Garcia's signature on her declaration "reveals that besides the inclusion of a middle initial, these unique signatures are almost identical." Although Evidence Code section 1417 allows a fact finder to determine the genuineness of handwriting by comparison to others treated as genuine, as mentioned above, a fact finder is not compelled to accept something as true or genuine simply because it can. (See *Bookout v. State of California ex rel. Dept. of Transportation*, *supra*, 186 Cal.App.4th at p. 1487.) Based on our review, we are not convinced the trial court was compelled to conclude that the same individual made both signatures. At a minimum, we note, as does Tropicale, that although Garcia's signature on her declaration contains a middle initial, the signature on the agreement does not.

2. *Tropicale's Evidentiary Objections*

Because we rely on Garcia's statement that she did not sign anything for Tropicale in September 2015, we consider whether, as Tropicale argues, the trial court erred in considering her declaration. In reviewing a trial court's decision to admit or exclude evidence, we adopt an abuse of discretion standard (*Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 446-447), although a legal error constitutes an abuse of discretion (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393-394). We conclude that it was proper for the trial court to have considered Garcia's declaration.

Tropicale argues that Garcia's declaration should have been excluded "on the grounds that her attorney's translation interposed a layer of hearsay over the entirety of the testimony contained herein." Tropicale principally relies on *Correa v. Superior Court* (2002) 27 Cal.4th 444 (*Correa*), where our Supreme Court considered whether an officer could testify at a preliminary hearing as to a declarant's out-of-court statements even when the declarant's statement was provided to the officer through a translator.[3] Answering yes, *Correa* held that "a generally unbiased and adequately skilled translator simply serves as a 'language conduit,' so that the translated statement is considered to be the statement of the original declarant, and not that of the translator." (*Id.* at p. 448.) In

[3] As *Correa* noted, Penal Code section 872, subdivision (b) allows an officer to testify at a preliminary hearing as to a declarant's out-of-court statement for the truth of the matter asserted notwithstanding the fact that the declarant's statement would be hearsay. (*Correa*, *supra*, 27 Cal.4th at pp. 451-452.) The question at issue in *Correa* was whether the translation of the declarant's statement created an *additional* level of hearsay. (*Id.* at p. 448.)

making a case-by-case determination as to whether the translator is a "language conduit," *Correa* stated that courts "should consider 'a number of factors which may be relevant in determining whether the interpreter's statements should be attributed to the [declarant] . . . , such as which party supplied the interpreter, whether the interpreter had any motive to mislead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated.'" (*Id.* at p. 458.)

Correa does not require a trial court to explicitly articulate such considerations, and in overruling Tropicale's objections, the trial court impliedly found that Jon B. Dumbeck, Garcia's attorney, acted as a mere "language conduit." (See Evid. Code, § 402, subd. (c) ["[a] ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto"].) This implied finding is supported by Dumbeck's representation that he is "fluent in Spanish," Garcia's native language, and "accurately translated" Garcia's declaration from English to Spanish for her before she signed it, as well as the fact that Dumbeck owes a duty of candor to the court. (Bus. & Prof. Code, § 6068, subd. (d) [attorney has duty to "never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law"].)

Tropicale's contention that Dumbeck was not a "language conduit" here is unpersuasive. Tropicale flatly asserts that Dumbeck is "a party with a financial stake in this action," despite offering no evidence to suggest why he would not translate impartially for Garcia here. Tropicale also contends that Dumbeck fails to demonstrate fluency because "he failed to prepare and attach a Spanish language version" of Garcia's

declaration, though Tropicale never articulates why such a task would have been required here. Although Tropicale cites *People v. Pantoja* (2004) 122 Cal.App.4th 1 as an example of a court applying *Correa* to exclude a translated declaration, that case is distinguishable. The declaration in *Pantoja* was excluded because "there [was] no indication in the record of who [the translator] was," "that person's proficiency as a translator," or "whether the statement was read to [the declarant] in either language or whether [the declarant] gave it any form of meaningful review." (*Pantoja*, *supra*, at p. 12.) Here, Dumbeck's representations establish that he translated the statement, that he is fluent in Spanish, and that he provided Garcia with a Spanish translation before she signed it. *Pantoja* therefore provides little help to Tropicale here, and we see no error on the part of the trial court in overruling Tropicale's objections and considering Garcia's declaration.

3. *Conclusion*

To prevail, Tropicale was required to establish that its evidence compelled a finding in its favor as a matter of law. (See *Sonic*, *supra*, 196 Cal.App.4th at p. 466.) Jara's declaration and a visual handwriting comparison did not compel this finding. Of note, Garcia denied signing the agreement in September 2015, after her termination and arguably when the agreement was purportedly signed, and none of Tropicale's evidence compels a finding that the agreement was signed at some other time. Moreover, the trial court did not err in considering Garcia's declaration. We therefore affirm.

III. DISPOSITION

The order is affirmed. Garcia is awarded her costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAPHAEL
J.

We concur:

MILLER
Acting P. J.

SLOUGH
J.